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# THE QUEST FOR NUMBER ONE IN COLLEGE FOOTBALL: THE REVISED BOWL CHAMPIONSHIP SERIES, ANTITRUST, AND THE WINNER TAKE ALL SYNDROME

C. PAUL ROGERS III\*

## I. INTRODUCTION

With any sports topic, everyone who is a sports fan has an opinion, and that opinion is not required to be rational or supported in the least by salient facts. College football's Bowl Championship Series (BCS) has been one of the most controversial topics discussed by sports fans since its inception in 1998.<sup>1</sup> Most everyone agrees that the system is flawed because virtually every year there has been a controversy about which two teams should play in the national championship game. Even the BCS architects understand that the system has flaws, as they continue to tweak the BCS system each year.<sup>2</sup>

Beyond the varying opinions and critiques of the BCS, a more fundamental issue regarding the system is whether it is legal. Specifically, does it violate the antitrust laws? This is not a specious question. The Senate Judiciary Committee conducted hearings on the legality of the BCS in October 2003, and the House Subcommittee on Commerce, Trade, and Consumer Protection conducted similar hearings in December 2005.<sup>3</sup> Another important

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1. *The BCS Is . . .*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/bcsfb/definition> (last visited Jan. 17, 2008).

2. *Id.*

3. *Determining a Champion on the Field: A Comprehensive Review of the BCS and Postseason College Football: Hearing Before the Subcomm. of Commerce, Trade, and Consumer Prot. of the H. Comm. on Energy and Commerce*, 109th Cong. 5 (2005); *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 5 (2003) [hereinafter *BCS or Bust*] (statement of Hon. Orrin Hatch, Chairman, Senate Comm. on the Judiciary).

aspect of the BCS is its prominent place as a visual symptom of America's "winner-take-all" society.<sup>4</sup> Is extreme competition, where everyone strives to be the best but very few actually achieve that goal, a good thing for our society? Is our cultural predilection for excessive competition helpful or harmful to individual initiative, achievement, and satisfaction?

These two fundamental issues, the legality of the BCS and the larger cultural issue regarding the "winner-take-all" society are symmetrical in a way. The initial question is whether the BCS stands as an abuse of accepted methods of economic competition as regulated by the antitrust laws, while the second issue focuses more broadly on whether the BCS is symptomatic of the excesses of competition in our society at large.

## II. HISTORY OF THE BCS

The goal of the BCS is to guarantee a championship game for Division I-A football within the traditional bowl system and without a playoff.<sup>5</sup> Division I-A college football's post-season has been made up of bowl games, rather than a playoff system, since early in the twentieth century.<sup>6</sup> Until 1992, the bowl system had no procedure for attempting to match the two top ranked teams against each other.<sup>7</sup> In 1992, the Bowl Coalition was formed in an attempt to remedy the problem, but it was unsuccessful due to the limitations inherent in its structure.<sup>8</sup> In 1995, the Bowl Alliance took the place of the Bowl Coalition and only slightly improved the chances of a post-season game between the teams ranked number one and two.<sup>9</sup> The BCS was founded in

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4. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* (1995).

5. In 2006, the NCAA changed the terminology used when referring to Division I-A and Division I-AA football. Division I-A is now known as the Football Bowl Subdivision (FBS) and Division I-AA is now called the Football Championship Subdivision (FCS). See David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM, Dec. 15, 2006, <http://sports.espn.go.com/ncf/columns/story?id=2697774>. For the purposes of consistency and preventing further confusion, this article will continue to refer to the divisions by their old names of I-A and I-AA.

6. JAMES QUIRK, *THE ULTIMATE GUIDE TO COLLEGE FOOTBALL: RANKINGS, RECORDS, AND SCORES OF THE MAJOR TEAMS AND CONFERENCES* (2004).

7. *BCS Chronology*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/bcsfb/history> (last visited Jan. 17, 2008).

8. See *id.* For example, the Big Eight champion could not be paired with the Southeastern Conference (SEC) champion in any bowl game. Also, the Big Ten and Pac-10 did not participate in the agreement at all. *Id.*

9. *Id.* This arrangement limited conference champion tie-ins to specific bowl games, allowing for greater flexibility in matching the two best teams. The arrangement's major flaw was that the Big Ten and Pac-10 Conferences were still not part of the arrangement, preferring to keep their traditional agreement with the Rose Bowl. *Id.*

1998 to further advance the goal of securing an annual championship game for Division I-A.<sup>10</sup>

There are two reasons why a playoff is not a desired option for Division I-A college football. First, college football is unwilling to do away with the tradition and uniqueness of the post-season bowl games.<sup>11</sup> Most of the important bowl games have been in existence since the 1930s, and the Rose Bowl was first played in 1902 before becoming a permanent annual event in 1916.<sup>12</sup> The second reason that a playoff system is not desired is because college presidents object to extending the football season for fear that it will unduly add to the educational challenges of participating student-athletes.<sup>13</sup> In response to this reasoning, critics ask why the National Collegiate Athletic Association's (NCAA) Board of Governors approved in 2005 a twelfth regular season game for Division I-A.<sup>14</sup> The only viable answer to this question is money. For many of the major college football powerhouses, an extra home game every year equals hundreds of thousands of dollars in revenue. The additional game allows schools with a large following and drawing power to schedule an additional home game each year against a typically underdog, non-conference opponent. For example, in 2005 Louisiana State University (LSU) played an extra home game against Appalachian State University and drew 91,414 people.<sup>15</sup>

While the stated goal of the BCS is to produce a national championship game working within the bowl structure,<sup>16</sup> it actually does much more than that. It has effectively created a bifurcated system within Division I-A

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10. *Id.*

11. *BCS or Bust*, *supra* note 3, at 13, 24-25 (statement of Myles Brand, President, National Collegiate Athletic Association).

12. QUIRK, *supra* note 6. For example, the Orange Bowl (Miami) was first played in 1932, while the Sugar Bowl (New Orleans) was founded in 1935. The Cotton Bowl in Dallas was played for the first time in 1937. Of the BCS bowls, the Fiesta is by far the newest. Its inaugural game was played in 1971. *Id.*

13. *BCS or Bust*, *supra* note 3, at 14 (statement of Harvey S. Pearlman, Chancellor, University of Nebraska-Lincoln).

14. *Division I-A Football Gets 12th Game*, NCAA.COM, Apr. 29, 2005, <http://www.ncaasports.com/story/8429299>.

15. Randy Rosetta, *How They Scored*, BATON ROUGE ADVOC., Nov. 6, 2005, at C10. The revenue generated from ticket sales alone for this game was over \$3.5 million. See *LSU Proposes Price Increase for Football Tickets*, ESPN.COM, Jan. 10, 2008, <http://sports.espn.go.com/ncf/news/story?id=3190951&campaign=rss&source=NCFHeadlines>. However, while adding an additional game can generate significant revenue for the home team, the strategy can backfire for teams striving to win a national championship, as evidenced by Michigan's defeat to Appalachian State by a score of 34-32 in September 2007. See Dan Wetzel, *Hail to the Victors*, YAHOO.COM, Sept. 1, 2007, <http://sports.yahoo.com/ncaaf/news?slug=dw-appstate090107&prov=yhoo&type=lgns>.

16. *BCS or Bust*, *supra* note 3, at 8.

between the BCS conferences and the non-BCS conferences. In other words, it creates a system of “haves” and “have-nots” in college football.<sup>17</sup>

It is important to realize that non-BCS schools have met all of the NCAA requirements for participation in Division I-A. Accordingly, each school has devoted substantial resources to all of its athletic programs in addition to the football program. To participate in NCAA Division I-A athletics, a school must sponsor sixteen sports (including eight women’s sports), must award ninety percent of the permissible grants-in-aid (e.g., eighty-five total for football), and must either give 200 overall grants-in-aid or spend at least \$4,000,000 on overall grants-in-aid.<sup>18</sup> These are very costly requirements when one considers that of sixteen sports only two, football and men’s basketball, are likely to produce revenue.<sup>19</sup> At most schools these two programs are expected to provide for the operating budgets of all sixteen programs. As a result, a great majority of Division I-A schools operate with significant athletic budget deficits.<sup>20</sup>

BCS membership is a prestige issue, but more importantly, it perpetuates a huge financial disparity that allows the rich to get richer while the poor continue to struggle. For example, the payout to each team receiving a BCS bowl berth is \$14 to \$17 million, about half of which the participating schools keep while the other half is divided among the other schools in the conferences of the participating schools, according to each conference’s allocation formula.<sup>21</sup> Since each BCS conference is guaranteed at least one BCS bowl berth, every single university in those conferences is guaranteed almost \$1 million every season, with a legitimate chance of receiving \$7 million or more. In contrast, teams that play in non-BCS bowls may receive as little as

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17. *Id.* at 16 (statement of Scott S. Cowen, President, Tulane University). Southeastern Conference Commissioner Mike Slive has stated that “where you stand is where you sit” on issues such as revenue sharing and access that arise from the BCS system. *Is the System Flawed? Legal Ramifications of the Bowl Championship Series and Conference Alignment*, 7 VAND. J. ENT. L. & PRAC. 461, 467 (2005).

18. NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA MEMBERSHIP REQUIREMENTS, [http://www1.ncaa.org/membership/governance/division\\_I/DI\\_Membership\\_Info/Information/memrequirements.pdf](http://www1.ncaa.org/membership/governance/division_I/DI_Membership_Info/Information/memrequirements.pdf) (last visited Jan. 17, 2008). For an antitrust analysis of the Division I-A membership requirements, see Christopher B. Norris, Comment, *Trick Play: Are the NCAA’s New Division I-A Requirements an Illegal Boycott?*, 56 SMU L. REV. 2355 (2003).

19. NAT’L COLLEGIATE ATHLETIC ASS’N, EEOC NOTICE NUMBER 915.002 (1997), available at [http://www.ncaa.org/gender\\_equity/resource\\_materials/Employment/EEOC\\_NOTICE.pdf](http://www.ncaa.org/gender_equity/resource_materials/Employment/EEOC_NOTICE.pdf) (acknowledging reality of revenue producing sports as possible defense for overpayment of men’s coaches in an equal employment opportunity action).

20. Kyle Nagel & Doug Harris, *A Building Boom Is Raging in College Athletics, and All the Big Schools Are Trying to Keep Up*, DAYTON DAILY NEWS (Ohio), Oct. 6, 2006, at B6.

21. *BCS Bowl Facts*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/bcsfb/facts> (last visited Jan. 17, 2008).

\$180,000 before expenses, effectively eliminating any revenue sharing by the other schools in non-BCS conferences.<sup>22</sup> Prior to the 2006-2007 season, the BCS was an alliance of six athletic conferences—the Big Ten, Big East, Pac-10, Southeastern Conference (SEC), Atlantic Coast Conference (ACC), and Big XII, plus the University of Notre Dame.<sup>23</sup> The remaining Division I-A football conferences, Conference USA, Mountain West, Mid American, Western Athletic, and Sun Belt, were recently listed by the BCS as participants in the system.<sup>24</sup> The six BCS conferences have exclusive agreements with the four BCS bowls, which the BCS selected—Rose, Fiesta, Sugar, and Orange.<sup>25</sup> Since 2006 there has been a fifth BCS bowl game, played one week after the other four, which is deemed “The National Championship Game.”<sup>26</sup> Also, the BCS has a \$320 million contract with FOX through 2010 (except for the Rose Bowl, which has a contract with ABC through 2014), which guarantees exclusive telecast windows for each BCS bowl game.<sup>27</sup> Each BCS conference champion is assured a BCS bowl bid no matter what its record. In the past, this guarantee has produced some striking unfairness. For example, in 2004 the Big East champion, Pittsburgh, went 8-3 and was defeated in the Fiesta Bowl by non-BCS University of Utah, the first non-BCS team in a BCS bowl.<sup>28</sup> In 2005, the ACC champion, Florida State

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22. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2006-07 POSTSEASON FOOTBALL NON-BCS REVENUE DISTRIBUTION (2007), available at [http://www1.ncaa.org/membership/postseason\\_football/2006-07/Non-BCS\\_rev\\_dist.pdf](http://www1.ncaa.org/membership/postseason_football/2006-07/Non-BCS_rev_dist.pdf). The New Mexico Bowl had the smallest payout last year, giving each team only \$180,000. *Id.* The Capital One Bowl (\$4.3 million per team), Cotton Bowl (\$3 million per team), Outback Bowl (\$3 million per team), and Chick-fil-A (Peach) Bowl (\$2.8 million per team) artificially raise the average payout for non-BCS bowls. *See id.* With the exception of these bowls, the average team playing in a non-BCS bowl receives no more than \$1.06 million. *Id.* Participating bowl teams must, of course, cover their expenses, which means that schools participating in the lower paying bowls typically lose a substantial amount of money because their expenses include not only team travel and lodging for up to a week but also the cost of transporting and lodging the marching band, the cheerleaders, and university officials. Furthermore, the bowl payouts typically include a requirement that each school sell an assigned number of tickets for the game. Any shortfall in a school's sales of its ticket allocation then comes out of its bowl payout. *See, e.g., College Football: In the Rose or in the Sun, Bowl Rewards Carry Financial Risks*, N.Y. TIMES, Dec. 27, 1999, at D1. Furthermore, some of the non-BCS conferences, such as the Western Athletic Conference (WAC), have sometimes financially “subvented” struggling bowl games in return for a guaranteed slot in the game.

23. *BCS Chronology*, *supra* note 7.

24. *The BCS Is . . .*, *supra* note 1.

25. *BCS Chronology*, *supra* note 7.

26. *Id.*

27. *Plus-One Could Be Next Step for BCS, But Major Hurdles Must Be Cleared*, CSTV.COM, Jan. 5, 2007, <http://www.cstv.com/sports/m-footbl/stories/010507aar.html>.

28. Tye Smith, *How Good Were They?*, DAILY UTAH CHRON. (Salt Lake City), Jan. 10, 2005, <http://media.www.dailyutahchronicle.com/media/storage/paper244/news/2005/01/10/Sports/How-Good.Were.They-831371.shtml>.

University, which was ranked twenty-second in the nation, received an automatic bid over higher ranked Texas Christian University (TCU), a non-BCS team.<sup>29</sup>

In addition to the automatic bids, two at-large bids fill the remaining slots for the four bowl games.<sup>30</sup> By contract, one of these bids goes to Notre Dame if it wins eight games and is ranked in the top eight.<sup>31</sup> Under the most recent agreement, for a non-BCS team to get an automatic bid it must finish in the top twelve in the BCS polls,<sup>32</sup> an improvement over the previous requirement that a non-BCS school finish in the top eight to gain an automatic BCS berth.<sup>33</sup>

In the 2006-2007 football season, over \$122 million went to the sixty-four BCS schools from the four BCS bowl games alone, while only \$20.5 million was split up among the remaining conferences; in addition, only \$75 million was divided among all schools (including BCS conference members) from the twenty-seven non-BCS bowl games.<sup>34</sup> Such a distribution of funds, which is inherent in the set up of the system, leads to competitive unfairness. For example, in 2004 the twenty-first-ranked Pittsburgh Panthers received \$14 million for being blown out in the Fiesta Bowl, while undefeated, tenth-ranked Boise State University played seventh-ranked University of Louisville in the non-BCS Liberty Bowl.<sup>35</sup> The take for each of those teams was \$1.35 million—\$12.65 million less than Pittsburgh.<sup>36</sup> In 1998, Tulane University

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29. NAT'L FOOTBALL FOUNDATION & COLLEGE FOOTBALL HALL OF FAME, 2005 FINAL BOWL CHAMPIONSHIP SERIES STANDINGS (2005), available at [http://msn.foxsports.com/id/7894701\\_37\\_1.pdf](http://msn.foxsports.com/id/7894701_37_1.pdf).

30. *BCS Chronology*, *supra* note 7.

31. *Id.*

32. *Id.* In 2007, Hawaii was able to snag an automatic slot by finishing tenth in the last BCS poll. Another way a non-BCS conference team can earn an automatic bid is by finishing in the top sixteen, if it is also ranked higher than a champion of a BCS conference. *Id.*

33. See *BCS Officials to Consider Plus-One Format*, Jan. 7, 2008, <http://www.msnbc.msn.com/id/22543610>. BCS officials are currently considering a "plus-one" format for the 2010 season that would essentially create a four team playoff. *Id.* The top four teams would be seeded at the end of the season, with number one playing number four and number two playing number three in bowl games. *Id.* The winner of the two "semifinals" would advance to play in the national championship game. *Id.* While this format is being considered, there is strong resistance from Big Ten and Pac-10 officials due to concerns that it would lessen the attraction of the Rose Bowl, with which the two conferences are affiliated. *Id.*

34. NAT'L COLLEGIATE ATHLETIC ASS'N, BOWL CHAMPIONSHIP SERIES FIVE YEAR SUMMARY OF REVENUE DISTRIBUTION 2002-2006 (2007), available at [http://www1.ncaa.org/membership/postseason\\_football/2006-07/5\\_yr\\_summary\\_rev\\_dist.pdf](http://www1.ncaa.org/membership/postseason_football/2006-07/5_yr_summary_rev_dist.pdf); NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 22.

35. Chadd Cripe, *Painfully Close: BSU's Perfect Season Ends with Loss in Liberty Bowl*, IDAHO STATESMAN (Boise), Jan. 1, 2005, at 1.

36. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 22.

was undefeated and ranked eleventh in the nation, but it received only \$1.1 million for its bowl while 8-3 Syracuse University, ranked eighteenth, received \$12.5 million for winning the Big East and getting an automatic BCS bid.<sup>37</sup>

BCS defenders argue that the plan was primarily designed to create a national championship game between the two best teams.<sup>38</sup> Even this function of the BCS has been surrounded by controversy virtually every year. One exception is the 2006 championship game (2005 season) between the University of Southern California (USC) and the University of Texas, who happened to be the only undefeated teams remaining.<sup>39</sup> In the 2004-2005 season, an undefeated Auburn University team was left out of the championship game, while the year before USC was left without a championship game berth.<sup>40</sup> The 2007 college football season was replete with more upsets of top-rated teams than perhaps any season in history, with the result that LSU became the first team in BCS history to make the national championship game with two losses.<sup>41</sup>

The BCS commissioners, aware of the inequality and shortcomings of the system, continue to tweak the BCS system and have provided greater access to non-BCS schools.<sup>42</sup> They continue to share slightly more revenue and provide slightly more access to non-BCS teams. In 2005-2006, only four percent of BCS revenues went to non-BCS schools, although that percentage increased substantially in the 2006-2007 season with the new rules.<sup>43</sup> Despite these recent concessions, the BCS could be subject to attack under both §§ 1 and 2 of the Sherman Act. Specifically, it could be considered an unlawful boycott<sup>44</sup>

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37. Marty Mule, *Odds Are TU Would Hold Own*, TIMES-PICAYUNE (New Orleans, La.), Jan. 7, 1999, at D1.

38. *The BCS Is . . .*, *supra* note 1.

39. Kevin Robbins, *The Final Test: A Year of Major Moments Led to This Day*, AUSTIN AM.-STATESMAN, Jan. 4, 2006, at A1.

40. Carten Cordell & Matt Nascone, *Bowl Victory Sweetens New Years on the Plains*, AUBURN PLAINSMAN, Jan. 20, 2005, at 1; Bill Plaschke, *LSU Players Don't Really Feel Like Sharing the Title*, L.A. TIMES, Jan. 5, 2004, at D1.

41. During the 2007 season, thirteen top five teams lost to unranked opponents, including the first defeat of a ranked Division I-A team by a Division I-AA team (Appalachian State over fifth-ranked Michigan). See Stewart Mandel, *A Wild Season*, SPORTSILLUSTRATED.COM, Dec. 18, 2007, [http://sportsillustrated.cnn.com/2007/writers/stewart\\_mandel/12/14/upsets/index.html](http://sportsillustrated.cnn.com/2007/writers/stewart_mandel/12/14/upsets/index.html). Six of those teams were ranked second at the time of their loss; one, West Virginia, lost at home to Pittsburgh during the final weekend of the season, despite being twenty-eight point favorites. See *id.* Additionally, over the course of one weekend, five teams in the top ten were defeated. *Id.*

42. *BCS Chronology*, *supra* note 7.

43. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 34.

44. See, e.g., *Nw. Wholesale Stationers, Co. v. Pac. Stationary & Printing Co.*, 472 U.S. 284 (1985); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Assoc. Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457



or an attempt to monopolize under the antitrust laws.<sup>45</sup>

### III. THE LEGALITY OF THE BCS UNDER THE ANTITRUST LAWS

The United States antitrust laws were first enacted in 1890 and are designed to protect and preserve competition in our free market economy.<sup>46</sup> In our capitalist system, the free market economy is intended to stimulate innovation and growth and to enhance consumer welfare.<sup>47</sup> As a result, § 1 of the Sherman Act prohibits competitors from cooperating, agreeing, or conspiring in any manner that unreasonably restrains trade.<sup>48</sup> Price fixing or market allocation conspiracies typically raise prices, restrict competition, and harm consumers.<sup>49</sup> Section 2 of the Sherman Act forbids monopolization or attempts to monopolize.<sup>50</sup> In contrast to § 1, the focus in § 2 is on single-firm conduct.<sup>51</sup> Monopolies eliminate competition through the exercise and abuse of market power, and then raise prices and make monopoly profits, all at the expense of competition and consumers.<sup>52</sup> In all, we have 115 years of case law applying the Sherman Act to a variety of anticompetitive activities.<sup>53</sup>

(1941); *E. States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

45. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541-42 (9th Cir. 1991).

46. See, e.g., RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992* (1996); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA – THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965); CARL KAYSER & DONALD F. TURNER, *ANTITRUST POLICY – AN ECONOMIC AND LEGAL ANALYSIS* (1959); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L. J. 257, 290 (1989).

47. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722, 2724 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077 (2007); *Brooke Group, Ltd., v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221, 224 (1993); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-43 (1979); see also RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 54 (Free Press 1993) (1978).

48. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2006).

49. See, e.g., *Bd. of Regents*, 468 U.S. 85; *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

50. 15 U.S.C. § 2 (2006).

51. *Id.*

52. See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

53. See, e.g., *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Fed. Trade*

Section 4 of the Clayton Act provides for a private right of action under the Sherman Act.<sup>54</sup> Therefore, in addition to the Department of Justice and the Federal Trade Commission Enforcement, private parties injured by a violation of the antitrust laws can bring a private enforcement lawsuit.<sup>55</sup> They may not only enjoin the unlawful conduct, but also may seek damages caused by the wrongdoing.<sup>56</sup> Congress, in creating the private right of action, sought to create incentives by granting successful plaintiffs treble damages plus attorney's fees.<sup>57</sup> In practice, this means the stakes could be very high if the BCS is indeed in violation of the antitrust laws. For example, if a college team could prove that it was wrongly excluded from a BCS bowl, that team's recoverable damages would be the BCS bowl payout (\$14.5 million) minus whatever amount the team received to play in a non-BCS bowl. That total would then be multiplied by three, and attorney's fees would be awarded. The final recovery amount would be close to \$40 million.<sup>58</sup>

Section 1 of the Sherman Antitrust Act contains many potential substantive offenses, such as price fixing, bid rigging, and division of markets.<sup>59</sup> It applies only to multiple firm action, most commonly where competitors conspire together for some mutual economic advantage. Thus, the BCS may be subject to challenge under § 1 because it is the product of agreement among its member conferences.<sup>60</sup> If that agreement unreasonably restrains trade, the BCS would be in violation of § 1.<sup>61</sup>

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Comm'n v. R.F. Keppel & Bros., 291 U.S. 304 (1934) (enforcing unfair and deceptive advertising and certain types of consumer abuse); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (weakening of traditional monopoly); *Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (enforcing preliminary injunctions against probable violations).

54. 15 U.S.C. § 4 (2006).

55. *Id.*; see also *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

56. 15 U.S.C. § 4; see also *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104 (1986).

57. 15 U.S.C. § 4; see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

58. The 2004 Liberty Bowl between Boise State and Louisville is a prime example. As noted above, Boise State received \$12.5 million less playing in the Liberty Bowl than it would have received had it played in the Fiesta Bowl instead of the twenty-first ranked Pittsburgh Panthers. Under the Clayton Act, if Boise State was successful in its claim, it would receive actual damages of \$12.5 million, trebled to \$37.5 million. In addition, Boise State would be awarded attorneys' fees, which could put the award over \$40 million.

59. 15 U.S.C. §§ 1-26(b) (2006).

60. See *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955, 959 (6th Cir. 2004); *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998), vacated on other grounds by *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999); *Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n (MIBA I)*, 337 F. Supp. 2d 563, 570-71 (S.D.N.Y. 2004).

61. Although the statute prohibits "every contract, combination . . . or conspiracy, in restraint of trade," 15 U.S.C. § 1, the Supreme Court early on interpreted the statute to cover only "unreasonable"

The most likely substantive § 1 violation applicable to the BCS is an unlawful boycott or concerted refusal to deal. Boycotts typically involve collective action by a group of competitors for the purpose of excluding or otherwise interfering with additional competitors' access to the market in which they compete.<sup>62</sup> Historically, boycotts have been considered inherently anticompetitive and, therefore, have been classified as per se illegal.<sup>63</sup> Per se illegality creates an irrebuttable presumption of unlawfulness. Therefore, if the per se rule applied to the BCS, it would be in violation of § 1 of the Sherman Antitrust Act.

The alternative to the per se rule is the rule of reason.<sup>64</sup> In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, the Supreme Court found that the rule of reason should apply to college athletics because colleges are institutions of higher education who must cooperate and agree on rules to participate in intercollegiate athletics at all.<sup>65</sup> In antitrust parlance, the rule of reason allows the defendant to argue that the alleged restraint is actually more pro-competitive than anticompetitive or, minimally, that it has a justifiable business purpose.<sup>66</sup> However, one could question whether the rule of reason should apply to the BCS because it is clearly a commercial enterprise designed to make profits for its member schools and conferences.<sup>67</sup>

If the per se rule were applied in this context, the next issue would be whether the BCS is subject to attack on a boycott theory. The BCS's activities

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restraints of trade. *Standard Oil Co., v. United States*, 221 U.S. 1 (1911).

62. C. PAUL ROGERS III ET AL., *ANTITRUST LAW: POLICY AND PRACTICE* 441-42 (4th ed. 2008).

63. See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *Radiant Burners, Inc. v. Peoples Gas & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 625 (1953); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951); *Fashion Originators' Guild v. Fed. Trade Comm'n*, 312 U.S. 457 (1941); *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291 (1923); *E. States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

64. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984); see generally *Chi. Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil*, 221 U.S. 1.

65. *Bd. of Regents*, 468 U.S. at 101.

66. ROGERS III ET AL., *supra* note 62, at 334-38.

67. Arguing against the application of the rule of reason would be an uphill battle, as the courts have consistently applied the rule of reason to cases involving collegiate athletics. See *Bd. of Regents*, 468 U.S. at 85; see also *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 388 F.3d 955 (6th Cir. 2004); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998); *Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n (MIBA I)*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); *Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n (MIBA II)*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

appear to meet the historical definition of a boycott, which is simply that some competitors band together to gain a competitive advantage over others.<sup>68</sup> However, antitrust law has evolved in the last three decades into what is a largely consumer welfare driven model.<sup>69</sup> Under this model, to prove an antitrust offense, one must prove consumer harm rather than simply proving harm to a competitor.<sup>70</sup> The new test is more consistent with the antitrust truism that antitrust law is designed to protect competition, not competitors.<sup>71</sup> For example, a small retailer may be very inefficient and unable to stay in a market because of higher costs, but it cannot look to the antitrust laws for protection unless its exclusion from a market due to the collective action of others also harms consumers.<sup>72</sup>

Furthermore, in 1985 the Supreme Court, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, put boycott law in a state of flux by ruling that some boycotts should be judged under the rule of reason.<sup>73</sup> The rule of reason should be applied at least where the boycott is unlikely to result in “predominately anticompetitive” effects.<sup>74</sup> The activity in *Northwest Stationers* involved a cooperative buying group of several competitors, which produced efficiencies by lowering costs. The co-op was sued by a competitor who had been kicked out of the buying group.<sup>75</sup> The Court ruled that proof of market power or unique access to a business element necessary for effective competition must be shown to establish the requisite anticompetitive effect.<sup>76</sup> Lower federal courts have struggled with the contours

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68. See, e.g., *NYNEX Corp.*, 525 U.S. at 128; *Radiant Burners, Inc.*, 364 U.S. at 656; *Klor's*, 359 U.S. at 207; *Assoc. Press v. United States*, 326 U.S. 1 (1945).

69. See, e.g., *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 224 F.3d 942, 958 (9th Cir. 2000); *Rice v. Treasure Island Assocs.*, 1997-2 Trade Cas. (CCH) ¶ 71,920, at ¶ 80,475 (9th Cir. 1997); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996); see also BORK, *supra* note 47; Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 721-29 (2007).

70. See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1074-75 (2007); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *Bd. of Regents*, 468 U.S. at 106-07; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

71. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2724 (2007); *Atl. Richfield*, 495 U.S. at 338; *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

72. See, e.g., *Reading Int'l, Inc. v. Oaktree Capital Mgmt., LLC*, No. 03 Civ. 1895(PAC), 2007 WL 39301 (S.D.N.Y. Jan. 8, 2007).

73. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985); see also Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015 (1986).

74. *Nw. Stationers*, 472 U.S. at 289.

75. *Id.* at 287.

76. *Id.* at 298.

of the Supreme Court's decision in *Northwest Stationers*, and the line between the rule of reason and the per se rule remains uncertain.<sup>77</sup>

With *Northwest Stationers* and *Board of Regents* as precedents, however, it is likely that a court would apply the rule of reason to an antitrust challenge to the BCS.<sup>78</sup> Thus, a court would attempt to balance the exclusionary effect of the BCS against its claimed pro-competitive benefits. In doing so, it would consider the BCS's claim that the system is justified to create a national championship game, which benefits rather than harms consumers because they desire the game.<sup>79</sup> The BCS would further claim that the system, as it was created, was necessary to induce the "major" conferences to break their traditional bowl ties and commit to a unified system.<sup>80</sup> Also, the BCS would point to the unwillingness of the university presidents to commit to a Division I-A playoff because of the extended season a playoff would require.<sup>81</sup>

Even under *Northwest Stationers*, however, the non-BCS schools can still argue that they have a legitimate case. The BCS does have market power, as demonstrated by the huge bowl payouts and lucrative television deals. Access to the BCS is necessary for a non-BCS school to compete in that BCS market. The lack of access has, of course, been the central complaint of the non-BCS schools. In the first eight years of the BCS, only one non-BCS school, Utah, when it was selected to play in the 2004 Fiesta Bowl, was able to play in a BCS bowl.<sup>82</sup>

It is unclear if a challenger to the BCS would have to prove consumer harm under a boycott theory. Supreme Court boycott decisions have historically not focused on consumer welfare and have sometimes emphasized the fate of small business.<sup>83</sup> Even the most recent Supreme Court boycott

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77. See, e.g., *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002); *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001); *U.S. Airways Group v. British Airways PLC*, 989 F. Supp. 482 (S.D.N.Y. 1997).

78. A third possibility is the so-called "quick look" rule of reason, which is designed to enable a court to quickly determine if a "full-blown" rule of reason analysis is needed or whether a quick look is all that is necessary to find the alleged restraint reasonable or unreasonable. See *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756 (1999); *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005); *Cont'l Airlines*, 277 F.3d at 499; *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998). But see *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 789-90 (9th Cir. 1996) ("[T]his so-called 'quick look' analysis is the exception rather than the rule.").

79. *BCS or Bust*, *supra* note 3, at 65 (statement of Harvey S. Perlman, Chancellor, Univ. of Nebraska-Lincoln).

80. *Id.*

81. *Id.*

82. Smith, *supra* note 28.

83. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (A boycott "is not to be tolerated merely because the victim is [just] one merchant whose business is so small that his destruction makes little difference to the economy").

decision makes no mention of consumer welfare.<sup>84</sup> Thus, it could be argued that consumer harm is not required in the boycott context.

Consumer harm, if required however, would be an additional obstacle and would be difficult for non-BCS schools to establish. Fans, the consumers of college football, have long demanded a national championship game. The BCS would argue that it is simply supplying a product that consumers desire; therefore, there is no consumer harm, regardless of whether some competitors are effectively excluded.<sup>85</sup> Non-BCS schools would respond that the exclusion from the national championship game is not what causes the primary harm, although an argument could be made that the selection system of the top two teams is biased in favor of BCS teams. Instead, the harmful exclusion is from the remaining BCS bowl games. The pivotal issue here is whether consumers have demanded these bowls or whether they more closely resemble the old bowl system where each bowl struck its own deal with a conference or school. The BCS would argue that the high payoffs and lucrative television contracts associated with the BCS bowl games prove that the BCS is simply meeting consumer demand.<sup>86</sup> However, restricting supply or output so as to raise prices is precisely what monopolists traditionally do, which harms consumers.<sup>87</sup> Without the BCS, bowl payouts and television contracts would likely decrease. This decrease would not necessarily be the result of consumer demand not being met; instead, it would be the result of the free market, with no artificial limit on the supply of BCS games.

For example, under the old NCAA television package, which was the source of the litigation in *Board of Regents*, only twelve games were televised per year and every school received the same \$600,000 per national appearance regardless of the “quality” of the match-up. For regional contests, the compensation was \$426,799 for each participating school.<sup>88</sup> In contrast, today in an unrestricted free market there are considerably more than twelve games on network and cable television every Saturday, but the revenue is much less

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84. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

85. *BCS or Bust*, *supra* note 3, at 65 (statement of Harvey S. Perlman, Chancellor, Univ. of Nebraska-Lincoln); see also Brett P. Fenasci, Comment, *An Antitrust Analysis of College Football's Bowl Championship Series*, 50 LOY. L. REV. 967, 985 (2004).

86. See, e.g., M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays in-Bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235, 1278-82 (2004); Fenasci, *supra* note 85; Mark Hales, Comment, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, 122-23 (2003).

87. See, e.g., F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 229-32 (2d ed. 1980); W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR., & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 293-98 (4th ed. 2005).

88. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 93 n.10 (1984).

for some schools and conferences and much more for others.<sup>89</sup> Notre Dame, for example, has the market clout to have its own network television deal with the National Broadcasting Company (NBC).<sup>90</sup>

Nonetheless, the BCS commissioners' tweaking of the system does seem to have improved access. Boise State in 2006 and the University of Hawaii in 2007 both played in BCS bowls, and from 2007 on, automatic qualification standards will be applied evenly to all eleven Division I-A conferences based on a rolling four-season evaluation of the play of each conference.<sup>91</sup>

Thus, while the exclusionary effects of the original BCS may have caused the requisite exclusionary effect for an unlawful boycott claim, the post-2007 changes make future antitrust challenges much less likely.<sup>92</sup> If there is no actual exclusion, and if the so-called playing field for inclusion in a BCS bowl is in fact level, no anticompetitive effect could be established. In that case, there is no real cause of action under § 1, and the consumer harm issue becomes moot.

It is also plausible that the BCS might be susceptible to challenge under § 2 of the Sherman Act as an illegal monopolist.<sup>93</sup> In order for the BCS to be

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89. Matt Woosley, *It Can Pay to Lose in College Football*, FORBES.COM, Dec. 5, 2006, [http://www.forbes.com/business/2006/12/04/college-football-profits-biz-cx\\_mw\\_1205football.html](http://www.forbes.com/business/2006/12/04/college-football-profits-biz-cx_mw_1205football.html). Conference affiliation is the key for the most part. For example, in 2006 the Southeastern Conference redistributed among its twelve members over \$60 million in revenue from television and bowl payouts. *Id.* In contrast, the top three revenue producing non-BCS conferences, Conference USA, the Western Athletic Conference, and the Mountain West Conference, earned a combined \$12.5 million for the same sources. *Id.* In contrast, Syracuse University alone, with a 1-10 record that year, earned \$19 million from its Big East share of television and bowl earnings. *Id.* In 2005 the University of Washington compiled a 2-9 win-loss record and earned \$19 million, just below the \$19.8 million that the University of Kentucky, with a 3-8 record, earned from its Southeastern Conference share. *Id.*

90. Richard Sandomir, *The Irish and the Peacock, Through Thick and Thin*, N.Y. TIMES, Oct. 14, 2005, at D6.

91. *BCS Selection Policies and Procedures*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/bcsfb/eligibility> (last visited Jan. 23, 2008). The future eligibility will allow automatic berths in BCS bowl games to between five and seven conferences. *Id.* The qualifying conferences will be determined based on an analysis of the previous four years of rankings taking into consideration factors such as (1) the highest-ranked team from the conference in the final BCS standings, (2) the final regular season rankings of all the teams in the conference, and (3) the number of teams from each conference ranked in the top twenty-five of the final BCS standings. *Id.*

92. *But see* Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219 (2007) (arguing that the anticompetitive effects still outweigh any pro-competitive benefits from the BCS, especially as less restrictive alternatives exist).

93. Section 2 also condemns conspiracies to monopolize. 15 U.S.C. § 2 (2006). Thus, another possible § 2 challenge would be that the BCS, since it is made up of multiple actors, has engaged in a conspiracy to monopolize the championship game or access to the BCS bowls. *See United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Am. Tobacco Co. v. United States*, 328 U.S. 781

in violation of § 2, it must possess monopoly power in the relevant product market and possess the requisite intent to monopolize.<sup>94</sup> This intent is measured through conduct.<sup>95</sup> Specifically, to prove intent to monopolize, the plaintiff/prosecutor would first have to prove that the national championship game is the relevant market, and secondly, that the BCS's conduct excludes non-BCS schools from a meaningful opportunity to compete for that game.<sup>96</sup> One difficulty with proving exclusion is that if a non-BCS school is ranked in the top two then that team would be able to play in the national championship game. This means that, at least theoretically, there may be a meaningful opportunity for all Division I-A teams to play in the championship game. Thus, even if the relevant market turns out to be the national championship game, it would be difficult to establish the conduct prong.<sup>97</sup>

Another possible relevant market is the four BCS bowl games together, excluding the national championship game. After all, these four games have huge payouts and lucrative television contracts that are distinct from and produce far more revenue than all of the other bowl games. In *International Boxing v. United States*, the Supreme Court held that championship fights are a separate market from non-championship fights because of the huge payout differential.<sup>98</sup> Since that is also the case regarding the BCS bowl games, a strong argument can be made that the four BCS games constitute a market apart and separate from all other bowl games. In that case, the BCS's prior actions in effectively excluding non-BCS schools from the four BCS bowl games could be evidence of conduct that would support the unlawful intent prong under § 2.

A § 2 claim along those lines would need to be based on the BCS's past conduct because the revised BCS system appears to be more transparent and

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(1946). Conspiracy to monopolize cases are exceptional since a conspiracy in restraint of trade is in essence a lesser included offense and obviates the necessity to prove that the conspirators had monopoly power. See, e.g., LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 154-55 (2d ed. 2006).

94. *Am. Tobacco Co.*, 328 U.S. at 809 (1946); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-32 (2d Cir. 1945).

95. *Copperweld v. Indep. Tube Corp.*, 467 U.S. 752, 767-68 (1984).

96. *Copperweld*, 467 U.S. at 767-68.; *Am. Tobacco Co.*, 328 U.S. at 809; *Aluminum Co. of Am.*, 148 F.2d at 431-32.

97. The conduct argument could still be made on a more nuanced level. Non-BCS schools have argued, for example, that the BCS poll and the scheduling of games by BCS schools unduly prejudices non-BCS schools since the BCS schools will typically only play non-BCS schools at home, lessening the chance for an upset and increasing the rankings for non-BCS schools. But unless it could be established that the BCS had such a policy for its member schools, rather than individual schools simply using their market clout to an advantage, it is unlikely those advantages would amount to unlawful conduct.

98. *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 250-51 (1959).



non-exclusionary. Just as under § 1, if there is no exclusionary conduct then there can be no § 2 liability. Thus, even if the BCS is found to have monopoly power after a relevant market analysis, if it is allowing access to its bowl games in an objective, non-discriminatory manner it would have no antitrust liability, at least under the revised plan.

#### IV. OUR “WINNER-TAKE-ALL” SOCIETY

The BCS and our society’s clamor about producing an “on-the-field” national champion is symptomatic of a larger cultural issue that goes far beyond antitrust policy. It signifies how competition and our preoccupation with winning not only rule our economy, but indeed our entire society. We compete at almost everything, and in everything we feel compelled to have winners and losers. Duffy Daugherty, the legendary Michigan State University football coach, once said that “[a] tie is like kissing your sister.”<sup>99</sup> And so we do not have ties any more: college football initiated an overtime system a number of years ago, soccer now has a shootout to decide the victor, and recently even the National Hockey League did away with ties by instituting its own shootout format.<sup>100</sup>

So why is it so important to have a national championship game in college football? Is Vince Lombardi’s famous quote, “Winning isn’t everything, it’s the only thing,”<sup>101</sup> a true statement? Is winning the only important aspect of competing? Unfortunately, Lombardi’s famous quote is quite reflective of our cultural values. Only championship teams get invited to the White House. Losing teams do not have reunions, get honored, or have books written about them.<sup>102</sup>

This cultural phenomenon is what some have called the “winner-take-all” society.<sup>103</sup> It is the idea that our system of values is completely skewed

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99. Duffy Daugherty Quotes, <http://thinkexist.com/quotation/a-tie-is-like-kissing-your-sister/533067.html> (last visited Jan. 23, 2008).

100. Professional and amateur baseball in the United States has historically played extra innings until a winner is determined. In Japanese professional baseball, however, a tie is declared if the score remains tied after ten complete innings.

101. DAVID MARANISS, *WHEN PRIDE STILL MATTERED: A LIFE OF VINCE LOMBARDI* 365 (1999).

102. There are, of course, exceptions. See, e.g., JIMMY BRESLIN, *CAN’T ANYBODY HERE PLAY THIS GAME?: THE IMPROBABLE SAGA OF THE NEW YORK METS’ FIRST YEAR (1963)* (covering the 1962 New York Mets, which became the losingest team in modern baseball history with 120 losses and only 40 wins); CHARLEY ROSEN, *PLAYERS AND PRETENDERS: THE BASKETBALL TEAM THAT COULDN’T SHOOT STRAIGHT* (2007) (about coaching the Pace University basketball team during the 1979-1980 season in which it compiled a 1-16 record);

103. FRANK & COOK, *supra* note 4.

towards those few people in society who “win” at the disproportionate cost of everyone else who thus become losers, unable to share in the spoils of winning.<sup>104</sup> As a primary example, reality television is invading our homes relentlessly with this idea—*Survivor*, *The Apprentice*, *The Weakest Link*, *American Idol*, and the list goes on.

Our society, athletics in particular, engenders a star system in which very few win and most lose.<sup>105</sup> Consider the NCAA basketball tournament where every one of the top sixty-five collegiate teams in the nation will end their season with a loss except the one winner. Of course, such a result is to be expected in professional sports, which is pure entertainment and capitalist business. But college athletics should not have to fall into that “winner-take-all” trap. After all, are colleges and universities not called to a higher purpose than to determine which can recruit and play the best athletes?<sup>106</sup>

104. *Id.* at 2.

105. *Id.*

106. Of course, a substantial literature exists that assertively argues that the colleges have sold out with respect to big-time athletics. See, e.g., JAMES A. MICHENER, SPORTS IN AMERICA 173-223 (1974); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2000); MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1990); RICK TELANDER, THE HUNDRED YARD LIE – THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT (1989); *Knight, Big 12 Coaches Agree: College Sports Are Big Business*, USATODAY.COM, Feb. 16, 2004, [http://www.usatoday.com/sports/college/2004-02-16-notes\\_x.htm](http://www.usatoday.com/sports/college/2004-02-16-notes_x.htm). In 2004, NCAA President Myles Brand was quoted at an ethics conference as saying: “College sports is not a business. It’s about educating young men and women in the field and in the classroom.” *Id.* Former Texas Tech coach Bobby Knight replied, “If it isn’t a business, then General Motors is a charity.” *Id.* Kansas basketball coach Bill Self asked why so many coaches get fired for losing “if it’s not a business.” *Id.* The problem is not a new one. Writing in 1938, Paul Gallico described college football as “one of the last great strongholds of genuine old-fashioned American hypocrisy.” PAUL GALICO, FAREWELL TO SPORT 208 (1938). He described college football as “only to be beginning to come into its own as the leader in the field of double-dealing, deception, sham, cant, humbug and organized hypocrisy.” *Id.* For an early defense of college football by a Harvard All-American, see BARRY WOOD, WHAT PRICE FOOTBALL – A PLAYER’S DEFENSE OF THE GAME (1932). For a comprehensive look at the history of college football, replete with scandals, see JOHN SAYLE WATTERSON, COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY (2000). Of course, since Gallico’s famous *Farewell to Sport*, which was published in 1938, college athletics have been plagued with betting and cheating scandals that Gallico could probably not have even dreamed of. See, e.g., JAMES A. BLACKWELL, ON BRAVE OLD ARMY TEAM: THE CHEATING SCANDAL THAT ROCKED THE NATION, WEST POINT, 1951 (1996); DAVID PORTER, FIXED: HOW GOODFELLAS BOUGHT BOSTON COLLEGE BASKETBALL (2000); CHARLES ROSEN, SCANDALS OF ’51: HOW THE GAMBLERS ALMOST KILLED COLLEGE BASKETBALL (1999); CHARLES ROSEN, THE WIZARD OF ODDS: HOW JACK MOLINAS ALMOST DESTROYED THE GAME OF BASKETBALL (2001); MURRAY SPERBER, ONWARD TO VICTORY – THE CRISES THAT SHAPED COLLEGE SPORTS (1998); DAVID WHITFORD, A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION, AND FOOTBALL AT SMU (1989); see also FRANK G. SPLITT, DRAKE GROUP, ARE BIG-TIME COLLEGE SPORTS GOOD FOR AMERICA? (2006), available at [http://www.thedrakegroup.org/Splitt\\_Good\\_for\\_America.pdf](http://www.thedrakegroup.org/Splitt_Good_for_America.pdf). (“Big-time college sports, as they exist today, compromise the

Athletics cannot exist without competition, but the problem arises in the societal excesses of competition. Athletic competition is healthy and fun when the competition itself is the focus, rather than the end result of winning or losing.

Harvard University, Princeton University, and the Massachusetts Institute of Technology (MIT) do it right. Harvard sponsors forty-one varsity sports, the most of any college in the country. Princeton and MIT are second, each sponsoring thirty-eight varsity sports.<sup>107</sup> Approximately twenty percent of the MIT student body, from which comes many of our most brilliant scientists and engineers, participates in a varsity sport as part of their college experience.<sup>108</sup> Their football team averages only 574 fans,<sup>109</sup> and the emphasis is on the competition, not just winning.<sup>110</sup>

The presidents' opposition to a Division I-A football playoff, while facially inconsistent with the approval of the twelfth game and the practice of other NCAA sports, is at least resistant to the "we must have a winner" mentality. In football, Division I-AA, Division II, and Division III have post-season playoffs.<sup>111</sup> Teams making it to the national championship game play

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educational, economic, and physical well-being of our nation . . . . Simply put, they are an anachronism. Not only that, they have also contributed to an imminent crisis in America that goes well beyond the playing fields.")

107. Official Site of MIT Intercollegiate Athletics, <http://mitathletics.cstv.com> (last visited Jan. 17, 2008). Harvard currently sponsors the most varsity sports in Division I athletics with forty-one official varsity teams. See Harvard College Athletics and Recreation, <http://www.college.harvard.edu/student/athletics> (last visited Jan. 24, 2008).

108. Work/Play Balance at MIT, [http://www.mitadmissions.org/topics/life/workplay\\_balance\\_at\\_mit](http://www.mitadmissions.org/topics/life/workplay_balance_at_mit) (last visited Jan. 24, 2008). Additionally, seventy-three percent of the student body participates in intramural sports and an additional ten percent compete in at least one of the thirty-five club sports offered by the athletic department, for a total of eighty percent of the student body participating in MIT athletics. *Id.*; see also MIT Athletics, <http://www.mitadmissions.org/topics/life/athletics> (last visited Jan. 24, 2008). Other prestigious academic institutions, such as Harvard and Princeton, support extensive club and intramural sports opportunities in addition to their successful varsity programs. In the past year, Princeton had about 1000 students participate in nearly thirty-five club sports and an additional 300 teams compete in over 1200 intramural contests. See Princeton Club Sports, [http://www.princeton.edu/studentguide/campus\\_culture/club\\_sports](http://www.princeton.edu/studentguide/campus_culture/club_sports) (last visited Jan. 24, 2008); Princeton Intramurals, [http://www.princeton.edu/studentguide/campus\\_culture/intramurals](http://www.princeton.edu/studentguide/campus_culture/intramurals) (last visited Jan. 24, 2008).

109. NAT'L COLLEGIATE ATHLETIC ASS'N, 2006 NATIONAL COLLEGE FOOTBALL ATTENDANCE 6 (2006), available at [http://www.ncaa.org/stats/football/attendance/2006/2006\\_football\\_attendance.pdf](http://www.ncaa.org/stats/football/attendance/2006/2006_football_attendance.pdf).

110. But see WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2005) and SHULMAN & BOWEN, *supra* note 106, both of which provide a detailed analysis of how the necessity of competing in college athletics compromises the educational policies of even small private colleges and highly selective universities.

111. NAT'L COLLEGIATE ATHLETIC ASS'N, 2007 DIVISION I FOOTBALL CHAMPIONSHIP HANDBOOK 11 (2007), available at [http://www.ncaa.org/library/handbooks/football/2007/2007\\_d1\\_](http://www.ncaa.org/library/handbooks/football/2007/2007_d1_)

as many as fifteen games in a season. Also, the NCAA basketball tournament, March Madness, requires sixty-five teams to spend up to an additional month away from classes, playing high stakes, nationally televised basketball.<sup>112</sup> While the tournament is great fun from the consumer's standpoint, its academic toll is undeniable. The graduation rates for Division I men's and women's basketball players are abysmal.<sup>113</sup> Gordon Gee, formerly Chancellor at Vanderbilt University and now President of The Ohio State University, is adamantly opposed to a football playoff and was quoted as saying that he would vote against the NCAA basketball tournament because of "the corrosive effect [it has] had on the academic environment at the university."<sup>114</sup> In response to sportswriters and consumers who say that college football is "just about winning or losing or having a national champion," Gee says, "I don't care [about a national champion]."<sup>115</sup>

Jock culture, and the rewards system that accompanies it, are due to the excesses of competition.<sup>116</sup> Think about the nature of competition. It means

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football\_handbook.pdf; NAT'L COLLEGIATE ATHLETIC ASS'N, 2007 DIVISION II FOOTBALL CHAMPIONSHIP HANDBOOK 11 (2007), available at [http://www.ncaa.org/library/handbooks/football/2007/2007\\_d2\\_football\\_handbook.pdf](http://www.ncaa.org/library/handbooks/football/2007/2007_d2_football_handbook.pdf); NAT'L COLLEGIATE ATHLETIC ASS'N, 2007 DIVISION III FOOTBALL CHAMPIONSHIP HANDBOOK 11 (2007), available at [http://www.ncaa.org/library/handbooks/football/2007/2007\\_d3\\_football\\_handbook.pdf](http://www.ncaa.org/library/handbooks/football/2007/2007_d3_football_handbook.pdf).

112. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION I MEN'S BASKETBALL CHAMPIONSHIP INFORMATION (2007), available at [http://www1.ncaa.org/membership/champadmin/basketball/d1\\_men/handbook/Important\\_dates.pdf](http://www1.ncaa.org/membership/champadmin/basketball/d1_men/handbook/Important_dates.pdf).

113. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA RESEARCH RELATED TO GRADUATION RATES OF DIVISION I STUDENT-ATHLETES 1984-2000, at 7 (2007), available at [http://www2.ncaa.org/portal/academics\\_and\\_athletes/education\\_and\\_research/academic\\_reform/grad\\_rate/2007/d1\\_summary.pdf](http://www2.ncaa.org/portal/academics_and_athletes/education_and_research/academic_reform/grad_rate/2007/d1_summary.pdf). More recent data, however, shows an improved graduation rate of sixty-four percent from student-athletes entering in 2000 for men's basketball.

114. Brent Wiseman, *VU Chancellor Staunchly Opposed to Grid Playoff*, SCOUT.COM, Jan. 4, 2005, <http://alabama.scout.com/a.z?s=14&p=2&c=337616>.

115. *Id.*

116. See, e.g., DAVID CALLAHAN, *THE CHEATING CULTURE: WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD* 69-72 (2004) (discussing the financial motivation for Danny Almonte to lie about his age in order to excel in Little League baseball); FRANK & COOK, *supra* note 4, at 30-32; STUART H. WALKER, *WINNING: THE PSYCHOLOGY OF COMPETITION* 58 (1980) ("The philosophy [athletes] hear announced is that the game's the thing, participation is what matters. But the questions they hear asked are, Who beat whom? Who got the medals? . . . . The modern competitor feels that to be approved, admired, respected, he must win.").

John Gerdy has described the excesses of competition in the United States as the All-American Addiction. See JOHN GERDY, *SPORTS: THE ALL-AMERICAN ADDICTION* (2002). According to Gerdy, youth sports have been taken over by compulsive, addictive adults while collegiate and professional sports are controlled by money and greed. *Id.*; see also BRUCE B. SVARE, *CRISIS ON OUR PLAYING FIELDS: WHAT EVERYONE SHOULD KNOW ABOUT OUR OUT OF CONTROL SPORTS CULTURE AND WHAT WE CAN DO TO CHANGE IT* (2004); BRUCE B. SVARE, *REFORMING SPORTS: BEFORE THE CLOCK RUNS OUT* (2004); John Gerdy, *Have College Athletics Become Destructive in America?*, 9 PROF. ETHICS 67 (2001).

that one person or team is trying to defeat another. One advances or wins only at another's expense. Winning is thus really a selfish act. Our society admires and emulates athletes who are "great competitors" and "hate to lose" rather than identifying those individuals as self-centered, egotistical, narcissistic, and self-entitled. Is it a positive trait for an individual to receive one's satisfaction and fulfillment from defeating another person?

Regarding the entitlement issue, Bobby Knight has said how much it bothers him when a touchdown-scoring wide receiver or a game-winning home run hitter thanks the Divine Being for his success.<sup>117</sup> Does God side with the winner and turn His back on the defeated? Consider Pete Rose, who was and probably still is a great competitor. Is that a compliment? Does being a great competitor somehow mean that you have character or integrity? It is fairly clear that Rose's competitive nature has greatly contributed to his other problems. It is not that being a great competitor makes one a bad person, it just does not necessarily make one a good person.

Social science data suggests that competition is bad for us socially and psychologically, and that in education it is counterproductive to learning.<sup>118</sup> Great and productive artists and scientists generally do not compete.<sup>119</sup> When Einstein developed the theory of relativity he was not competing against anyone, he was simply using his God-given talent to think about how the world works.

The excesses of competition produce serious societal behavioral problems such as the Pacers-Pistons brawl in November 2004.<sup>120</sup> The Texas Rangers had an altercation in the bullpen in Oakland in September 2004 because an A's "fan" had been berating the Rangers' bullpen for two-plus hours.<sup>121</sup> The Oakland A's security refused to move the fan, a season ticket holder, who strategically had his seats near the opposing bullpen so that he could scream obscenities at the opposition. Fan behavior, according to sociologists, is at an all-time low.<sup>122</sup>

The behavior of parents is also at an all-time low, pushing their sons and daughters toward the athletic brass ring. Remember that only a few years ago

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117. JOHN FEINSTEIN, A SEASON ON THE BRINK: A YEAR WITH BOB KNIGHT AND THE INDIANA HOOSIERS 68 (1986).

118. ALFIE KOHN, NO CONTEST: THE CASE AGAINST COMPETITION 49-50 (Mariner Books 1992) (1986).

119. *Id.* at 54.

120. M.L. Elrick & Shawn Windsor, *Foul Play in Auburn Hills: Pacers in Brawl with Palace Fans*, DETROIT FREE PRESS, Nov. 20, 2004, at 1A.

121. Tim Cowlshaw, *Rangers' Bullpen Loses Control and the Seat Hits the Fan: Showalter Slow to Apologize for Club's Ugliest Moment*, DALLAS MORNING NEWS, Sept. 15, 2004, at 1C.

122. KOHN, *supra* note 118, at 146-47.

one hockey parent actually beat a parent of the opposite team to death.<sup>123</sup> Three years ago in East Texas, a disgruntled parent shot and almost killed the local high school football coach because he thought his son was not getting enough playing time.<sup>124</sup>

The “winner-take-all” syndrome also encourages and results in cheating.<sup>125</sup> Pete Rose would never have been banned from baseball for illegal betting if he was not obsessed with winning. Likewise, if steroids would have been available while he was playing, it is likely that he would have eagerly embraced the ability to enhance his performance on the field.

Major League Baseball’s steroid scandal is only the tip of that iceberg. The evidence shows an increased frequency of use in Minor League Baseball.<sup>126</sup> Steroid use is an epidemic in places like the Dominican Republic among teenagers who look at successful athletes in America and see “juicing up” as their way off the island to the riches of American sports.<sup>127</sup>

A corollary problem is that our “star system” results in a serious misallocation of resources.<sup>128</sup> Just as in the Dominican Republic, the incredible rewards and wealth of the few “winners” divert young people into competitions they will lose. Another clear example of this can be seen in Hollywood, where so many potential actors move to pursue their dream but

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123. David Webber, *No Excuse: Juror's Convict Hockey Father*, BOSTON HERALD, Jan. 12, 2002, at 1A.

124. John F. Thompson, *Texas Father Charged with Assault in Football Coach's Shooting*, USATODAY.COM, Apr. 7, 2005, [http://www.usatoday.com/news/nation/2005-04-07-coach-shot\\_x.htm](http://www.usatoday.com/news/nation/2005-04-07-coach-shot_x.htm). Another example of parental misbehavior occurred during a 1996 high school football game in Albuquerque, New Mexico. Prior to the game, a father of one of the players had sharpened the buckles on his son's helmet, leading to significant injuries to five of the opposing players and one of the referees. See Jeff Carlton, *Welcome to the Albuquerque Sports Hall of Shame*, ALBUQUERQUE TRIB., July 29, 2004, at D1.

125. CALLAHAN, *supra* note 116, at 81. Of course, cheating in sport, indeed in college football, is nothing new. When in 1939 University of Chicago President Robert Maynard Hutchins suddenly dropped football at his institution, which was then a member of the Big Ten Conference, he was asked why. His response was brief and to the point, “To be successful, one must cheat. Everyone is cheating and I refuse to cheat.” RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* 212 (1989). For sources covering many of the cheating scandals in collegiate athletics, see *supra* note 106.

126. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 44-46 (2007) (noting that in 2001, more than nine percent of the minor league drug tests came back positive and that through the 2006 season, 247 minor league players have been suspended after positive tests).

127. Mike Fish, *Steroid Problem Reaches Critical Mass in the D.R.*, ESPN.COM, Feb. 14, 2007, <http://sports.espn.go.com/mlb/news/story?id=2763194>.

128. FRANK & COOK, *supra* note 4, at 61.

never make it.<sup>129</sup>

“Winner-take-all” societies attract too many contestants in part for the same reason casinos attract people to gamble away their money. In both situations, people grossly overestimate their chances of winning. This author recalls a recent Sports Illustrated survey of Division I basketball players regarding their National Basketball Association (NBA) prospects. It found that more than three out of five Division I basketball starters believe they can and will play in the NBA. Even though these individuals are already very successful basketball players who are members of an elite group, they are seriously miscalculating their NBA chances. For their collective estimates to be true, the NBA would have to absorb about one thousand new players per year, or about thirty-three new players per team, excluding any consideration of the influx of foreign talent and high school phenoms that now make up over twenty percent of NBA rosters.<sup>130</sup> In reality, only about thirty Division I starters, or one-third of one percent, will make an NBA team.

The star system also misallocates resources in another way—the production and procurement of luxury goods to satisfy the insatiable materialistic appetites of those very few who do make it.<sup>131</sup> Consider the \$4 million diamond ring Kobe Bryant bought for his wife after his troubles stemming from an incident in a Colorado hotel room.<sup>132</sup> Bryant’s resources would have been exponentially more beneficial had they been allocated to relief from Hurricane Katrina, towards the AIDS epidemic in Africa, or for computers for inner-city Los Angeles school children. He could have donated \$3.95 million to his favorite charity and still bought his wife a \$50,000 diamond ring.

## V. CONCLUSION

One could argue, paradoxically perhaps, that the bowl system kept big-time college football, prior to the advent of the BCS, as a last bastion against our “winner-take-all” approach to competition and the excesses it generates.<sup>133</sup>

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129. *Id.* at 2.

130. *Where the NBA Players Come From*, RPIRATINGS.COM, <http://www.rpiratings.com/NBA.html> (last visited Jan. 18, 2008). This statistical study shows that foreign and high school players make up approximately nineteen percent of NBA rosters. Thirty-three current players entered straight out of high school, while fifty foreign players are currently on NBA rosters (note that this number excludes foreign players who played college basketball in the United States). *Id.*

131. FRANK & COOK, *supra* note 4, at 82.

132. Booth Moore, *Bryant Gives His Wife a \$4-Million Ring*, L.A. TIMES, July 26, 2003, at E18.

133. Of course, one could also argue that the resistance of Division I-A to a playoff is really nothing more than historical accident since the bowls predate playoffs in any collegiate sport at any level.

Powerful societal forces such as the press, arguably representing public opinion, and television, with its huge economic and exposure rewards, have steadily forced a march to a playoff system, with a national championship game as the pot of gold at the end of the rainbow.<sup>134</sup> Fairness and access pressures have, however, resulted in a less opaque and more transparent BCS, at a minimum reducing the likelihood of antitrust and congressional intervention. Still, the current system remains a compromise between a true playoff on the one hand and the interests of the bowl games and the somewhat conflicted concerns of the university presidents on the other.<sup>135</sup>

Thus, although the new and revised BCS format is less susceptible to legal challenge, it remains a product of our societal predilection for winners and losers. It seems to be lost to most observers that in the collegiate world at least important values other than simply winning at any cost should be taught and emphasized. The fact remains that the demand for a national championship game in college football is rooted in the societal demand for excessive, unhealthy competition that does not easily fit within (and can be harmful to) the institutions of higher education that participate. Beyond that, the current system is ineffectual and unfair even if it likely does now pass antitrust muster.

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134. The college bowls have over the years contributed millions and millions of dollars to collegiate athletic budgets, but it is undeniable that the BCS creates many more millions of dollars for distribution, at least to the BCS participants.

135. There is some irony in the fact that previously the “mythical” national champion in Division I-A football was determined off the field by the various polls. Currently, since the BCS poll determines which two teams play in the National Championship Game, the participants in that game are determined off the field as well.



